STATE OF MICHIGAN
IN THE SUPREME COURT

PHYLLIS L. GRIFFITH, Legal Guardian for Douglas W. Griffith, a legally incapacitated adult,

Plaintiff-Appellee,

v

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Defendant-Appellant.
_____/

Supreme Court No. 122286

Court of Appeals No. 232517

Ingham County Circuit Court
No. 97-87437-NF

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REPLY BRIEF OF AMICUS CURIAE AUTO CLUB INSURANCE ASSOCIATION TO PLAINTIFF-APPELLEE'S BRIEF ON APPEAL

PROOF OF SERVICE

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I. IN THE ABSENCE OF A CAUSAL CONNECTION BETWEEN A MOTOR VEHICLE ACCIDENT AND THE ONGOING NEED FOR ROOM AND BOARD BY A PERSON INJURED IN THE ACCIDENT, THE FOOD PURCHASED BY, OR ON BEHALF OF, THE PERSON INJURED IN THE ACCIDENT DOES NOT CONSTITUTE AN "ALLOWABLE EXPENSE" PURSUANT TO THE REQUIREMENTS OF MCL 500.3107(1)(a).

A review of the arguments presented in the Brief of Plaintiff-Appellee, PHYLLIS L. GRIFFITH ("Plaintiff's Brief"), is much like viewing the conclusion of a fireworks display--pyrotechnics going off in all directions simultaneously, without coordination. Nevertheless, if just the cumulative sensory effect is measured without more, at the moment of explosion, the impact can appear to be significant. Of course, the display exhausts itself quickly and what is left is a darkening sky filled with smoke that obscures the firmament. In this case, the potential jurisprudential impact of Plaintiff's arguments is of a similar lifespan. To so illustrate, it is helpful to present Plaintiff's rhetorical sparklers separately.

A. The Legislative "Mandate" of §3107(1)(a) of the No-Fault Act

Perhaps the biggest juridical bombshell contained in Plaintiff's Brief is the argument that §3107(1)(a), MCL 500.3107(1)(a), has been misconstrued since inception. According to Plaintiff, the word "accommodation" should be defined to include "[a]nything that supplies a need, want, convenience, etc",[1] or "[s]omething that meets a need, convenience".[2] (Plaintiff's Brief at 4-5). According to Plaintiff, then:

> "[W]hen the No-Fault Act is strictly construed, there is **no limiting phrase or concept** regarding the compensability of an *'allowable expense' 'benefit'* other than what is commonly understood to be a '*product, service or accommodation*'. Rather, the only concomitant requirements are (1) whether the product, service or accommodation is *'reasonably necessary . . . for an injured*

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1 Random House Webster's Collegiate Dictionary, 1997 and 1991 editions.

2 American Heritage Dictionary (2nd College ed.).

person's care, recovery or rehabilitation'; and (2) whether the charge for the expense incurred was *'reasonable'*. **No further analysis is warranted or permitted.**"

(Plaintiff's Brief at 6-7) (citation omitted) (italics in the original) (emphasis added).

According to Plaintiff, therefore, all persons are entitled to first-party no-fault benefits as delineated in the prior quotation. After all, "[h]ad the Legislature intended or desired to limit the [scope of such benefits, particularly room and board, to catastrophically injured persons], it would have done so by further definition or delineation". (Plaintiff's Brief at 4). Thus, when Plaintiff concludes, after the language quoted above, that "Appellee's $10 per day food expense constitutes a compensable *'allowable expense'* benefit under §3107(1)(a), in actuality, Plaintiff's statement is far too restrictive. If, under Plaintiff's interpretation of "accommodation", Plaintiff is entitled to a food allowance, every person who suffers "accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle", MCL 500.3105(1), is similarly entitled, **at least** until the injured person has recovered or is rehabilitated.

Yet we know that such benefits are not being paid and have not been paid, except in cases of catastrophic injury. Nor, as far as the research of the undersigned indicates, has any claim been pursued on any basis other than catastrophic injury.

Now, while it may be said that epiphanies can occur at any time, these facts suggest that Plaintiff's proposed interpretation of §3107(1)(a) may, indeed, prove too much. See Brief of Amicus Curiae, Auto Club Insurance Association ("ACIA Brief") at 10-24. As implicitly recognized by Plaintiff, there is no basis in the language of §3107(1)(a) for distinguishing between those who are catastrophically injured and those who are not. On this point, there is agreement. The question is what should be done about the distinction engrafted into §3107(1)(a)

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by Justice BOYLE's opinion in Manley v Detroit Automobile Inter-Insurance Exchange, 425 Mich 140; 388 NW2d 216 (1986) and the Court of Appeals decision in Reed v Citizens Insurance Co, 198 Mich App 443; 499 NW2d 22 (1993), lv den, 444 Mich 964; 514 NW2d 773 (1994). This Court must confront and answer that question.

B. The chimera of the "consumption factor"

Perhaps beguiled by the term "consumption factor" and its nominal association with the fact that people "consume" food, Plaintiff attempts to establish that this Court's decision in Miller v State Farm Mutual Insurance Co, 410 Mich 538; 302 NW2d 537 (1981) compels the conclusion that "established Michigan no-fault jurisprudence * * * clearly prohibits PIP benefits from being withheld or reduced by personal *'consumption factors'*". (Plaintiff's Brief at 14) (italics in the original).

Plaintiff's proposed conclusion is a classic case of overreading and, thereby, overreaching. Indeed, a careful reading of this Court's opinion supports the arguments of ACIA in this case.

Let us begin with the obvious. Miller involved the interpretation of §3108 of the No-Fault Act, dealing with survivors' loss benefits; this case involves interpretation of §3107(1)(a). There are significant distinctions between the provision of benefits pursuant to §3107(1)(a) and §3108. One such distinction is the scope of the financial benefit. Under §3107(1)(a), the amount of benefits is open-ended, both in terms of the amount of benefits payable during a given timeframe and the amount of benefits payable in a lifetime. Pursuant to §3108, benefits are limited to $1,435.00 in any 30-day period ($1,000.00 at the time of this Court's opinion in Miller) and is limited to the first three years after the date of the accident.

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Another significant distinction is the matter of computation of benefits. Pursuant to §3108, benefits are calculated (up to the maximum allowed) by enumerating "contributions of tangible things of economic value, not including services, that the dependents of the deceased at the time of the death would have received for support during their dependency from the deceased if he had not suffered the accidental bodily injury causing death". As the Court of Appeals explained in Hamilton v AAA Michigan, 248 Mich App 535; 639 NW2d 837 (2001):

> "In order for a no-fault insurer to be responsible for a particular expense, three requirements must be satisfied; (1) the expense must have been incurred by the insured, (2) the expense must have been for a product, service, or accommodation reasonably necessary for the injured person's care, recovery, or rehabilitation, and (3) the amount of the expense must have been reasonable."

Id. at 543 (citations omitted).

These distinctions inform a judicious analysis of Miller. The first question that this Court considered in Miller was whether survivors' loss benefits should (in the situation before this Court where the entire contribution to the dependents' support came from wages alone), be computed based on gross or net wages. The Court of Appeals concluded that the computation be on gross wages. Miller v State Farm Insurance Co, 88 Mich App 175, 180-181; 276 NW2d 873 (1979).

This Court reversed that part of the Court of Appeals opinion. Particularly, it rejected the Court of Appeals' reliance on a different section of the Act, MCL 500.3107(b), in reaching its conclusion. This Court focused on the specific language of §3108:

> "Of greater significance to the present issue is the language of §3108 that a 'survivors' loss * * * consists of a loss * * * of contributions of tangible things of economic value * * * that dependents of the deceased * * * *would have received for support* * * *.' (Emphasis added.)"

Id. at 564.

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After observing that (1) "it would be unrealistic to fail to acknowledge that surviving dependents would *not* have received for their support that portion of the deceased's income that he would have been required to pay in taxes" and (2) "the adjustment for such taxes can be accurately based on readily ascertainable information, without unnecessary administrative delays or time-consuming factual disputes", this Court concluded:

> "We find that the language of §3108 establishes that the Legislature intended that the amount of survivors' loss benefits should reflect an adjustment made for taxes that the deceased would have paid on taxable items included in the §3108 benefit calculation."

Id. at 564. The members of this Court unanimously agreed with that conclusion.

The next issue examined by this Court in Miller proved more jurisprudentially divisive. This Court then confronted the question of whether the calculation of survivors' loss benefits under §3108 include a reduction for those purely personal expenses of the deceased that are avoided by reason of the death of the decedent. Writing for a bare majority, including Justices FITZGERALD, WILLIAMS and BLAIR MOODY, JR., Justice RYAN concluded that the answer should be "No".

Acknowledging that "[t]he bare language of the statute does indeed suggest that [a consumption factor should be included]" and "despite the apparently plain and simple language of the statute", id. at 565, Justice RYAN enunciated "two persuasive indications" to the contrary:

> "The first is the legislative history of the adoption of §3108, and the second is the declared purpose of the no-fault act as a whole."

Id. at 566.

The first reason need not detain this Court long as this Court has made clear its disdain of referring to legislative history where the statutory language at issue is "plain and simple". The second reason bears more scrutiny. As Justice RYAN explained:

> "The [No-Fault] Act is designed to minimize administrative delays and factual disputes that would interfere with achievement of the goal of expeditious compensation of damages suffered in motor vehicle accidents. * * * [W]hile §3108 does not provide for a deduction for personal expenses of the decedent by reason of his death, it does contain an absolute ceiling on the amount of survivors' loss benefits for any 30-day period. Thus, §3108 itself, and the act as a whole, presumably reflect a balance struck by the Legislature between absolute factual precision in the calculation of benefits and the goal of 'assured, adequate, and prompt reparation for certain economic losses'."

Id. at 568. Therefore, he concluded:

> "Calculation, in every case, of a 'consumption factor' attributable to the decedent's personal expenses would be inconsistent with the declared legislative purposes of expeditious settlement of survivors' claims without complex factual controversy."

Id.

Justice LEVIN, writing for Chief Justice COLEMAN and Justice T.G. KAVANAGH, dissented from that conclusion "because I can see no basis for construing out of the statute a distinction that is clearly there". Id. at 575. Justice LEVIN then discussed the two rationales proffered by the majority opinion. Here again, the second rationale will be the focus.[3] Justice LEVIN recognized "that the construction of §3108 which I think correct will often necessitate a time-consuming and difficult factual inquiry". Id. at 584. Nevertheless, Justice LEVIN continued:

3As to the question of legislative history, the dissenting opinion focused instead on the plain meaning of the statutory language at issue, reaching the same conclusion as to its meaning that the majority opinion did:

> "The **plain language of the act** indicates that a survivor cannot recover what would have been spent on the decedent's personal expenditures, since such amount could not be contributed to dependents for their support. I would not depart from the most plausible reading of the language in favor of an alternative reading based on 'mute intermediate legislative maneuvers'[.]"

Id. at 583 (emphasis added).

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> "I am persuaded that the Legislature intended that income that would have been committed to the personal expenditures of the decedent should not be considered as an economic loss of the survivors. Indeed, the Court does not argue that the loss of wages that would have been spent on the decedent is actually an economic loss of the survivors. Obviously, the survivors cannot be considered to have lost what they never would have recovered. **To construe §3108 otherwise defeats the general goal of reducing the cost of no-fault insurance through rigorously confining damages to genuine economic loss.**"

Id. at 585 (emphasis added).

Application of the principles of the majority opinion in Miller to this scenario--assuming the propriety of extrapolating from the interpretation of a different provision of the No-Fault Act principles applicable to interpreting the section of the Act at issue here--militates in favor of adoption of the position advocated by ACIA.

First and foremost, the characteristics that distinguish §3107(1)(a) from §3108 suggest that the provisions be interpreted separately. The absence of any sort of cap on the amount of benefits that can be awarded pursuant to §3107(1)(a) suggests that the balance relied upon by Justice RYAN in Miller would not be applicable here.

Second, the distinction between the manner in which the benefits are computed also suggests that the result in Miller (leaving aside entirely the question of whether this Court would disregard--as did the majority opinion in Miller--the plain meaning of the language used in §3108) is not transferrable to this situation. Recall that, in Miller, the amount of survivors' loss benefits was readily calculable; it was the proposed set-off that was difficult to quantify. As this Court noted:

> "A family is not run like a commercial enterprise. Family finances are not allocated or their expenditure accounted for as in a business. Accounting procedures are rarely, if ever, followed to account for the precise dollars-and-cents expenses in cash and in kind attributable to each member of the family. How, for example, would the deceased breadwinner's 'consumption factor' for family meals, use of the family automobile, household maintenance and hundreds of personal expenses be calculated? And, if calculable at all, one can envision the

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> interminable controversy and disproportionate expense such a factual determination would involve."

Id. at 569.

Contrast that scenario to that involving claims for §3107(1)(a). In the latter circumstance, the claimant has the burden of proving that (1) the expense for which reimbursement is claimed has been incurred, (2) the charge for the product, service, or accommodation was reasonable and (3) the product, service or accommodation was reasonably necessary for the injured person's care, recovery, or rehabilitation. Spect Imaging, Inc v Allstate Insurance Co, 246 Mich App 568; 633 NW2d 461 (2001). As the Court of Appeals noted in that case, each particular expense must be proved by the plaintiff to be reasonable and necessary before an insurer can be held liable for reimbursement under §3107. Id. at 576. There is no readily ascertainable benefit amount; there is no question of set-off.

Except in situations in which, specifically due to the physical condition of the injured person, a precise diet is prescribed by that person's physician or the injured person lives by himself or herself, the same proof problems that exist in the survivors' loss benefits scenario exist in trying to ascertain the value of the food consumed by an injured person in a home setting. These evidentiary obstacles lead to the conclusion that Justice RYAN would not have reached the same conclusion in this case as in Miller.

C. The "situs question"

By far the most imaginative section of Plaintiff's Brief is that devoted to the "situs question". To quote Plaintiff's Brief, "Michigan no-fault jurisprudence has consistently held that mere *'situs'* does not establish a sufficient causal nexus for benefit eligibility under §3105". (Plaintiff's Brief at 14). What follows is a litany of cases in which the outcome-determinative question is whether the "accidental bodily injury" unquestionably suffered by the injured person

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arose "out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" as required by §3105(1). See Plaintiff's Brief at 14-18. Having participated in some of those cases, ACIA has no quarrel with the results therein. However, Plaintiff misses the mark when extrapolating the results of those cases to this factual situation.

Of greatest significance, the recitation was unnecessary. As set forth in the ACIA Brief:

> "[T]he test for 'allowable expenses' does not differ with the location of where the injured person is being treated or is convalescing. 'Allowable expenses' always consist of 'all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery or rehabilitation'. MCL 500.3107(1)(a). However, 'allowable expenses' must be incurred due to injuries suffered by the injured party 'arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle'. MCL 500.3105(1). If the expenses for which first-party no-fault benefits are sought do not 'aris[e] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle', then those expenses are not 'allowable expenses'. If the expenses for which first-party no-fault benefits are sought are not 'allowable expenses', then §3107(1) is simply inapplicable."

(ACIA Brief at 21-22).

The question is whether there is a causal nexus between the expense for which reimbursement under §3107(1) is claimed and the injuries that arose out of the motor vehicle accident. In this situation:

> "Food, indeed, contributes in a general way (absent, of course, a prescription for a specific diet) to an injured person's care, recovery, or rehabilitation. After all, in the absence of food, the injured person would die. Yet, (except where there is a prescription for a specific diet) there is no causal nexus between the consumption of food and the injuries suffered by the injured person arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle."

(ACIA Brief at 23).

Applying Plaintiff's reasoning rigorously, a no-fault insurer should not have to pay for food consumed by an injured person in an institutional setting. As set forth in the ACIA Brief, however:

"There are good reasons, consistent with the objectives of the No-Fault Act, to require that the no-fault insurer be responsible for that expense. In an institutional setting, it is patently reasonable to permit the institution to have control over the food served to their patients. The patient (or the patient's family) is not, therefore, in a position to insist that the patient consume food that could be prepared or obtained at a lower cost. The patient (or the patient's family) is not in control over the supply of food. In that circumstance, by definition, the cost of food consumed by the patient is likewise not in control of the patient or the family. Furthermore, the cost associated with the provision of food in an institutional setting usually includes overhead factors that inflate the price well beyond the cost of what could be obtained outside the institutional setting."

(ACIA Brief at 23-24) (footnote omitted).

Thus, consistent with Justice RYAN's concerns in Miller and because, "[i]n this setting, the treatment facility exercises monopoly control over the provision of food--there is no meaningful freedom to choose":

"The only remaining question is who should bear the burden of that situation--the patient or the applicable no-fault insurer. The answer to that question lies, appropriately, in §3105(1) of the No-Fault Act. All that needs to be known is why the injured person is in the treatment facility to begin with. [Where] the injured person is in a treatment facility due to injuries 'arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" * * *, "the applicable no-fault insurer is responsible for the cost of food consumed by the injured person."

(ACIA Brief at 24).

Plaintiff seeks to flip that argument on its head and claim that because the no-fault insurer is responsible for the cost of food consumed by the injured person in an institution, that fact alone mandates that the no-fault insurer be responsible for the cost of food consumed by an injured person at home. (Plaintiff's Brief at 18-19). The analysis in subsection A provides sufficient refutation.

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Dated: September 16, 2004

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PROOF OF SERVICE

STATE OF MICHIGAN)
)ss
COUNTY OF WAYNE)

KATHY JOZSA, being first duly sworn, deposes and says that on the 16th day of September, 2004, she did serve a copy of **REPLY BRIEF OF AMICUS CURIAE AUTO CLUB INSURANCE ASSOCIATION TO PLAINTIFF-APPELLEE'S BRIEF ON APPEAL and this PROOF OF SERVICE** upon: **GEORGE T. SINAS, ESQ./BRYAN J. WALDMAN, ESQ./L. PAGE GRAVES, ESQ. (Attorneys for Plaintiff-Appellee), 3380 Pinetree Road, Lansing, MI 48911 and DANIEL S. SAYLOR, ESQ./DAVE N. CAMPOS, ESQ./PAUL E. TOWER, ESQ. (Attorneys for Defendant-Appellant), 1000 Woodbridge Street, Detroit, MI 48207**, by mailing same to said attorneys in a sealed envelope, properly addressed, with first class postage prepaid thereon, and by depositing same in the United States Mail at Detroit, Michigan.

Kathy Jozsa
KATHY JOZSA

Subscribed and sworn to before me
this 16th day of September, 2004.

Barbara A Lamb
Notary Public: BARBARA A. LAMB
Macomb County, Michigan
My Commission Expires: 6/22/10
Acting in Wayne County

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Kathy Jozsa
KATHY JOZSA

Subscribed and sworn to before me
this 16th day of September, 2004.

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Notary Public: BARBARA A. LAMB
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